

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

BRENT GAMBLE, an individual,

Plaintiff,

v.

PACIFIC NORTHWEST REGIONAL CONCIL
OF CARPENTERS; JIMMY MATTA, in his
official capacity as a representative of the
Regional Council; JOHN TORKELOSON, in his
official capacity as representative of the Regional
Council and DOES 1-50, inclusive,

Defendants.

CASE NO. C14-455 RSM

ORDER GRANTING MOTION TO
DISMISS PLAINTIFF'S SECOND
AMENDED COMPLAINT

This matter comes before the Court upon Motion to Dismiss Plaintiff's Second Amended Complaint by Defendant Pacific Northwest Regional Council of Carpenters ('PNWRCC'). Dkt. # 32. This Court granted PNWRCC's prior motion to dismiss Plaintiff's first amended complaint, albeit with leave to amend his disparate treatment and retaliation claims brought under state and federal law. Having considered the parties' memoranda, the relevant record, and oral arguments by counsel, the Court grants Defendant's Motion and now dismisses Plaintiff's Second Amended Complaint with prejudice.

BACKGROUND

The facts as asserted in Plaintiff's Second Amended Complaint are substantially similar to those set forth in the Court's prior Order of dismissal. *See* Dkt. # 12. Plaintiff Brent Gamble

1 filed this action on March 28, 2014 against the PNWRCC, as well as two of its named and
2 numerous of its unnamed representatives and employees, claiming that he was retaliated
3 against, wrongfully terminated, and subjected to a hostile work environment on account of his
4 race and participation in protected activity. *See* Dkt. # 1. Mr. Gamble's Second Amended
5 Complaint alleges that his employment with the PNWRCC began on November 11, 2012 as a
6 Representative in the PNWRCC Union headquarters in Kent, WA, where he was placed on 90
7 days probationary employment status after which time he would become fully vested in his
8 position. *See* Dkt. # 27 (SAC) at ¶¶ 11-13. Mr. Gamble asserts that "he had significant periods
9 of satisfactory, exceeding expectations, competent and diligent performance" throughout the
10 probationary period. *Id.* at ¶ 15. Mr. Gamble alleges that his position was nonetheless abruptly
11 terminated on February 12, 2013, four days after he would have fulfilled his 90-day
12 probationary status, under the pretext of performance-related grounds. *Id.* at ¶¶ 15, 26.

14 Among Mr. Gamble's responsibilities during this period was recruiting for the "Helmets
15 to Hardhats" federal program to promote military apprenticeship in the construction industry.
16 *Id.* at ¶¶ 17, 20. Believing that his role included pursuing outreach opportunities, Mr. Gamble
17 sent an email "feeler" to local radio station KRIZ, which traditionally serves the African-
18 American community in the Seattle area. *Id.* at ¶ 20. Mr. Gamble promptly informed
19 Defendants of the email, including his supervisor, Defendant John Torkelson. *Id.* at ¶ 22. Mr.
20 Gamble asserts that Defendants "reacted with extreme punitive measures," accusing him of
21 "going outside the chain of command and undermining the PNWRCC media relations
22 manager," who was not in the workplace to approve the email "feeler" due to health reasons. *Id.*
23 at ¶ 24.

1 Mr. Gamble alleges that rather than employ its progressive disciplinary policy in
2 response to typical employee misconduct, the PNWRCC decided to terminate his employment
3 immediately. Defendant Jimmy Matta's letter, informing Mr. Gamble of the disciplinary
4 decision, stated that "after a thorough review of your performance we have determined that
5 your services will no longer be needed." *Id.* at ¶ 26. Plaintiff alleges that the decision to
6 terminate his employment was motivated by racial animus towards his efforts to increase the
7 diversity of the apprenticeship program's applicant pool, rather than by legitimate,
8 performance-based concerns. *Id.* at ¶ 27. It is disputed whether Plaintiff was still on
9 probationary employment status when terminated. Either way, Mr. Gamble was considered an
10 "at will" employee subject to discharge at any time, with or without cause. *See* Dkt. # 19, Ex. 1,
11 p. 2.¹

13 Plaintiff filed the instant lawsuit following his termination, seeking declaratory and
14 injunctive relief as well as monetary damages. On January 29, 2015, the Court entered an
15 Order dismissing Plaintiff's First Amended Complaint in its entirety and providing leave to
16 amend solely with respect to Plaintiff's claims for disparate treatment and retaliation under the
17 Washington Law against Discrimination ("WLAD"), RCW 49.60.010 *et seq.* and 42 U.S.C. §
18 1981. Plaintiff timely filed his operative Second Amended Complaint, which alleges six
19 causes of action: (1) disparate treatment discrimination in violation of § 1981, (2) unlawful
20 retaliation in violation of § 1981, (3) disparate treatment discrimination in violation of the
21 WLAD, (4) unlawful retaliation in violation of the WLAD, (5) breach of contract under §
22 1981, and (6) discrimination in violation of Title VI of the Civil Rights Act of 1964, 42

24 ¹ Defendant asks the Court, without objection by Plaintiff, to take judicial notice of PNWRCC's Personnel Policy. *See*
25 Dkt. # 32, p. 5 n. 2. PNWRCC's Personnel Policy is relied on in Plaintiff's Second Amended Complaint and is thus
26 properly considered by the Court without converting this motion into one for summary judgment. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

1 U.S.C. § 2000d *et seq.* See SAC. Defendant again moves to dismiss each cause of action with
2 prejudice for failure to state a claim on which relief may be granted. See Dkt. # 32.

3 DISCUSSION

4 A. Legal Standard

5 To survive a motion to dismiss under Rule 12(b)(6), “a complaint must contain
6 sufficient factual matter, accepted as true, ‘to state a claim to relief that is plausible on its face.’”
7 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,
8 570 (2007)). Where the plaintiff fails to “nudge[] [her] claims across the line from conceivable
9 to plausible, [her] complaint must be dismissed.” *Twombly*, 550 U.S. at 570. A claim is
10 facially plausible if the plaintiff has pled “factual content that allows the court to draw the
11 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at
12 678. “Threadbare recitals of the elements of a cause of action, supported by mere conclusory
13 statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555). In other words, the plaintiff
14 must provide grounds for her entitlement to relief that amount to more than labels or
15 conclusions and extend beyond a formulaic recitation of the elements of a cause of action.
16 *Twombly*, 550 U.S. at 545.

17
18 In making a Rule 12(b)(6) assessment, the court accepts all facts alleged in the
19 complaint as true, and draws all inferences in the light most favorable to the non-moving
20 party. *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal
21 citations omitted). The court typically cannot consider evidence beyond the four corners of
22 the complaint, but it may rely on documents referred to in the complaint when they are central
23 to a party’s claim and their authenticity is not in question. *Marder v. Lopez*, 450 F.3d 445, 448
24
25
26

(9th Cir. 2006). The court may also consider evidence subject to judicial notice. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

B. Disparate Treatment Claims

Mr. Gamble's first and third claims for relief allege discrimination on account of race in violation of 42 U.S.C. § 1981 and the WLAD, respectively. Both claims are governed by the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate*, 470 F.3d 827, 837-38 (9th Cir. 2006) (affirming that Title VII substantive standards apply to § 1981 claims); *Kastanis v. Educ. Employees Credit Union*, 122 Wash.2d 483, 859 P.2d 26, 30 (1993) (applying *McDonnell Douglas* framework to claims under the WLAD). Under this framework, the plaintiff bears the initial burden to allege facts supporting the elements of a prima facie case of discrimination. *Id.* at 1182 (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)). If the plaintiff makes this showing, the burden shifts to the defendant to offer evidence of a nondiscriminatory reason for the adverse action, and then again to the plaintiff to demonstrate that the proffered reason is mere pretext. *Id.*

A prima facie case of disparate treatment discrimination requires the plaintiff to demonstrate that: (1) he is a member of a protected class, (2) he was qualified for his position (i.e. satisfactorily performing his job), (3) he suffered an adverse employment action, and (4) similarly situated employees outside the protected class were treated more favorably, or other circumstances surrounding the adverse action exist that give rise to an inference of discrimination. *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603 (9th 2004); *accord Chen v. State of Washington*, 86 Wash.App. 183, 189, 937 P.2d 612 (Wash. Ct. App. 1997).

Alternatively, a plaintiff need not invoke the *McDonnell Douglas* presumption if he produces

1 direct or circumstantial evidence demonstrating his employer's discriminatory intent.

2 *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122 (9th Cir. 2004); *Vasquez v. Cnty. of Los*
3 *Angeles*, 349 F.3d 634, 640 (9th Cir. 2003).

4 The Court begins by analyzing whether Mr. Gamble's Second Amended Complaint
5 satisfies the four required prongs of his prima facie case. While Defendant does not dispute
6 that the first three prongs are met in this case, it again argues that Plaintiffs failure to plead the
7 existence of a legally cognizable comparator is fatal to his disparate treatment claims. The
8 Court agrees.

9
10 Absent evidence of other circumstances giving rise to an inference of discrimination,
11 Mr. Gamble must plead the existence of one or more valid comparators. *Peterson*, 358 F.3d at
12 603. As the Court explained in its prior Order of dismissal, doing so requires that Plaintiff
13 allege sufficient facts that, accepted as true, could demonstrate that a person outside of his
14 protected class but similarly situated in all other material respects was treated more favorably.
15 *See Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2008). This test is a stringent one. *Blair v.*
16 *Alaskan Cooper and Brass Co.*, 2009 WL 2029963, *7 (W.D. Wash. 2009) (citing *Moran*,
17 447 F.3d at 754).

18
19 Here, the sole comparator that Plaintiff has specifically pointed to in his operative
20 complaint, through his opposition brief, or at oral argument is Mr. Turkelson. SAC at ¶ 30.
21 Yet as his supervisor, Mr. Turkelson cannot be said to be similarly situated to Mr. Gamble
22 with respect to disciplinary matters. *See Vasquez*, 349 F.3d at 641 ('Employees in supervisory
23 positions are generally deemed not to be similarly situated to lower level employees.'). Nor
24 does Plaintiff allege that Mr. Turkelson or any other employee engaged in a comparable act of
25 asserted misconduct. *See id.* Again, Plaintiff's bare allegation that he was treated unfavorably
26

1 relative to unnamed non-Black employees, SAC at ¶ 30, merely recites an element of his
2 prima facie and must consequently be discarded at the Rule 12(b)(6) stage. *See Iqbal*, 556
3 U.S. at 679.

4 Aside from the existence of a valid comparator, Plaintiff fails to point to any direct or
5 circumstantial evidence of discriminatory intent. Plaintiff's operative complaint states no
6 allegations of overheard derogatory statements or other direct evidence that could prove the
7 fact of discriminatory animus without inference or presumption. *Cf. Godwin v. Hunt Wesson,*
8 *Inc.*, 150 F.3d 1217, 1221-22 (9th Cir. 1998) (locating direct evidence of sex discrimination in
9 statement by defendant's national sales manager that he "did not want to deal with another
10 female"); *Cordova v. State Farm Ins. Companies*, 124 F.3d 1145, 1149-50 (9th Cir. 1997)
11 (locating direct evidence of race discrimination where employer referred to a Mexican-
12 American employee as a "dumb Mexican"). Nor does Plaintiff point to any circumstantial
13 evidence from which the Court could infer discriminatory intent. *Cf. Jauregui v. City of*
14 *Glendale*, 852 F.2d 1128, 1134-35 (9th Cir. 1988). As Plaintiff has failed to make out his
15 prima facie case of racial discrimination, his disparate treatment claims must therefore again
16 be dismissed.
17

18 **C. Retaliation Claims**

19 Through his second and fourth claims for relief, Plaintiff alleges that his termination
20 from employment with the PNWRCC was taken in retaliation for his outreach to a radio
21 station with a predominantly African-American listening audience and for his opposition to
22 the denial of apprenticeship opportunities for African-American applicants. SAC at pp. 13-14,
23 16-17. As Plaintiff's Second Amended Complaint is virtually identical to his previously
24 dismissed First Amended Complaint with respect to his retaliation claims, the Court dismisses
25
26

1 Plaintiffs renewed claims.

2 In order to make out a prima facie case of retaliation, Mr. Gamble must show that: (1)
3 he engaged in a protected activity, (2) he suffered an adverse employment action, and (3) a
4 causal link exists between the two. *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir.
5 1994); *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 969 (9th Cir. 2002) (applying
6 identical standards to retaliation claims brought under federal law and the WLAD). In other
7 words, as the Court explained in its prior Order of dismissal, Plaintiff must allege facts that,
8 accepted as true, would show that he engaged in an act of opposition to an allegedly
9 discriminatory policy or practice, which in turn incited the retaliation against him.² This act of
10 opposition could be met by showing that Plaintiff asked “hard or searching questions,”
11 confronted his employers with objections, or in some way communicated his opposition to a
12 discriminatory policy or practice to his employers. *See Lodis v. Corbis Holdings, Inc.*, 172
13 Wash.App. 835, 292 P.3d 779 (2013).

14
15 Here, Plaintiff points to no asserted act of opposition other than his sending of an
16 exploratory email to KRIZ. There is no allegation that this communication, or any
17 communication to Plaintiff's supervisors surrounding it, was confrontational. To the contrary,
18 Plaintiff immediately informed his supervisors of his email overture, evidently anticipating
19 that his initiative in reaching out to KRIZ would be celebrated. Although Mr. Gamble asserts
20 that he opposed discriminatory hiring practices in the apprenticeship program, he has not pled
21 any act through which he made his opposition known to his employers. Further, Mr. Gamble
22 has failed to respond to the PNWRCC's argument that his pleading are lacking in this respect,
23

24
25 ² As the Court determined in its prior Order, Plaintiff again does not plead that he participated in a protected
26 proceeding. Thus, only the “opposition clause” of the WLAD and Section 1981 is at issue. *See* RCW 49.60.210 & 42
U.S.C. § 2000e-3(a) (protecting an employee from being retaliated against for opposing a forbidden practice).

1 which can itself can construed as an admission that Defendant's Motion has merit. *See* LCR
2 7(b)(2). For all these reasons, Plaintiff's retaliation claims shall again be dismissed.

3 **D. Breach of Contract Claim**

4 The Court previously dismissed with prejudice Plaintiff's tortious interference claim,
5 which Plaintiff is apparently now endeavoring to resurrect in the form of a breach of contract
6 claim. Through his fifth claim for relief under § 1981, Plaintiff pleads that he had completed
7 his probationary period when terminated and was thus "entitled to enjoy the fully vested
8 benefits of his contract with Defendant Union[.]' SAC at ¶ 75. However, regardless of
9 probationary status, all PNWRCC employees are employed on an "at will" basis, subject to
10 termination at any time with or without cause. Dkt. # 19, Ex. 1, p. 2. As an at-will employee,
11 Mr. Gamble could not have had a legitimate business or contractual expectancy in his
12 continued employment. *Woody v. Stapp*, 146 Wash.App. 16, 24, 189 P.3d 807 (Wash. Ct.
13 App. 2008) ("Generally, at-will employees do not have a business expectancy in continued
14 employment."). The PNWRCC's progressive disciplinary policy also provides it the "right to
15 terminate an employee immediately even for one act of misconduct," including for an act of
16 "insubordination." Dkt. # 32, Ex. A, ¶¶ 8.1, 8.3.

17 Because Plaintiff had no contractual right to either continued employment or
18 progressive discipline in lieu of termination, his Fifth Claim for relief shall be dismissed as a
19 matter of law. Again, Plaintiff's failure to respond at all to the PNWRCC's arguments as to this
20 claim is construed as an admission that they have merit. LCR 7(b)(2).

21 **E. Title VI Discrimination Claim**

22 Finally, Plaintiff's Sixth Claim for relief pleads discrimination under Title VI of the
23
24
25
26

1 Civil Rights Act. As the PNWRCC points out, this claim is ambiguously pled: it is unclear
2 whether Plaintiff's claim is directed solely toward his own termination or whether he seeks to
3 represent prospective apprentices in challenging the PNWRCC's allegedly discriminatory
4 hiring policy. At oral argument, Plaintiff clarified that he sought to plead only the former.

5 Title VI of the Civil Rights Act provides that "[n]o person in the United States shall, on
6 ground of race, color, or national origin, be excluded from participation in, be denied benefits
7 of, or be subjected to discrimination under any program or activity receiving Federal financial
8 assistance." 42 U.S.C. § 2000d. To make out his claim, Plaintiff must show that the entity
9 involved is engaging in racial discrimination and that the entity is the recipient of federal
10 funding. *Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1447 (9th Cir. 1994),
11 *overruled on other grounds by Daviton v. Columbia/HCA Healthcare Corp.*, 241 F.3d 1131
12 (9th Cir. 2001). A private individual may sue to enforce Title VI only in instances of
13 intentional discrimination. *Alexander v. Sandoval*, 532 U.S. 275, 281 (2001). In the Ninth
14 Circuit, a private plaintiff's Title VI disparate treatment claim is analyzed under the same
15 *McDonnell Douglas* burden-shifting framework that apply to Title VII and similar claims.
16 *Rashdan v. Geissberger*, 764 F.3d 1179, 1182-83 (9th Cir. 2014).

17
18 For the reasons set forth with respect to his Section 1981 and WLAD disparate
19 treatment claims, Plaintiff has also failed to make out a prima facie case of intentional
20 discrimination with respect to his Title VI claim. Although Mr. Gamble pled that the
21 PNWRCC receives federal funds, the complete lack of direct or circumstantial evidence in his
22 Second Amended Complaint indicating that racial bias motivated the PNWRCC's decision to
23 terminate his employment is fatal to his Title VI claim. *See Joseph v. Boise State Univ.*, 998
24 F.Supp.2d 928, 944 (D. Idaho 2014) (citing *Quintero v. Clovis Unified School Dist.*, 2013 WL
25
26

1 3198767 (E.D. Cal. 2013). Plaintiffs threadbare allegations and personal belief that the
2 PNWRCC discriminated against him on the basis of his race, *see* SAC at ¶ 85, are purely
3 conclusory and are therefore insufficient to state a “plausible claim to relief.” *See Iqbal*, 556
4 U.S. at 679; *see also Joseph*, 998 F.Supp.2d at 945. The Court may not permit a complaint to
5 survive the motion to dismiss stage where, as here, its allegations suggest the mere “possibility”–
6 rather than plausibility–of misconduct. *Id.*

7
8 Finally, to the extent that Plaintiff did intend to plead a third-party representative
9 claim challenging the Council’s allegedly discriminatory practices in regards to recruitment of
10 minority apprentices, he has failed to show in his pleadings that he has standing to do so.

11 “Although federal courts take a broad view of constitutional standing in civil rights
12 cases, a civil rights plaintiff claiming discrimination must satisfy the case or controversy
13 requirement of Article III by demonstrating [his] standing to sue at each stage of the litigation.”
14 *Wood v. City of San Diego*, 678 F.3d 1075, 1083 (9th Cir. 2012). Plaintiff must accordingly
15 show that he suffered an injury in fact, that this injury was traceable to the PNWRCC’s
16 actions, and that it can be redressed by a favorable decision. *Id.* Plaintiff must thereby
17 demonstrate that he has a sufficiently concrete interest in the outcome of the issue in dispute
18 (here the failure to hire minority apprentices) by virtue of his own injury. *See Thomas v.*
19 *Mundell*, 572 F.3d 756, 763 (9th Cir. 2009). For instance, in *McCullum*, the Supreme Court
20 held that the State of Georgia had third-party standing to raise the equal protection rights of
21 jurors improperly excluded from a jury by a criminal defendant’s discriminatory use of
22 peremptory challenges. *Georgia v. McCollum*, 505 U.S. 42 (1992). The Court held in so
23 ruling that a state suffers a cognizable injury for standing purposes because racial
24 discrimination in the selection of jurors “casts doubts on the integrity of the judicial process”
25
26

1 and on the fairness of criminal proceedings. *Id.* at 56 (internal quotation omitted).

2 The problem with a representative claim in this case is that Plaintiff has not shown that
3 the sole injury he alleges – his termination – is traceable to the PNWRCC's alleged
4 discrimination against minority apprentices. It is not clear that were the PNWRCC to hire
5 more minority apprentices, for instance, Plaintiff's own employment prospects as a union
6 representative would be redressed. While Plaintiff may have a general interest in seeing more
7 minority apprentices hired, he must show that this interest relates directly to his injury, or, in
8 other words, that he himself is being injured by virtue of discriminatory hiring practices
9 against the apprentices. This he has not done. Further, Plaintiff's allegation that the PNWRCC
10 was discriminating against African-American apprenticeship applicants is conclusory at best
11 and not in itself sufficient to pass Rule 12(b)(6) muster. Plaintiff's Title VI intentional
12 discrimination claim shall accordingly be dismissed.

13
14 **F. Leave to Amend**

15 The sole remaining issue is whether to permit Plaintiff leave to again amend his
16 pleadings. Where claims are dismissed under Rule 12(b)(6), the court “should grant leave to
17 amend unless it determines that the pleading could not possibly be cured by the allegation of
18 other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). Leave to amend need not be
19 granted, and dismissal may be ordered with prejudice, if amendment would be futile.
20 *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998); *see also Lucas v. Dept.*
21 *of Corrections*, 66 F.3d 245, 248 (9th Cir. 1995).

22
23 Here, Plaintiff has proven the futility of allowing amendment of his disparate
24 treatment and relation claims. His Second Amended Complaint is substantially identical to his
25 first with respect to these claims and fails to correct the deficiencies previously identified by
26

1 the Court. Plaintiffs' First through Fourth and Plaintiffs Sixth Claims for Relief shall
2 accordingly be dismissed with prejudice. *See Ebeid ex. rel. U.S. v. Lungwitz*, 616 F.3d 993,
3 1001 (9th Cir. 2010) (affirming dismissal with prejudice of second amended complaint).
4 Because Plaintiffs newly added breach of contract claim fails as a matter of law, it too shall be
5 dismissed with prejudice as it is clear that it could not be saved by amendment. *Salameh v.*
6 *Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013).

7 8 CONCLUSION

9 For the reasons stated herein, the Court hereby ORDERS that Defendant's Motion to
10 Dismiss Plaintiff's Second Amended Complaint (Dkt. # 32) is GRANTED. Plaintiff's Second
11 Amended Complaint is hereby DISMISSED with prejudice and without leave to amend. This
12 case shall be CLOSED.

13 Dated this 28th day of May 2015.

14
15 

16 RICARDO S. MARTINEZ
17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26